



National FOIA Office
EPA Office of General Counsel

FOIA Supervisor Training Region 2 FOIA Training Conference September 5, 2019

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Why is this training important?

- ❖ To help you comply with the law.
 - ❖ Under the FOIA any person has a right of access to federal agency records unless those records are protected from disclosure under the law.
- ❖ To avoid excessive FOIA litigation and attorneys' fees.
- ❖ To support the Agency's 2018-2022 Strategic Plan.
- ❖ To meet EPA's FOIA commitments in the November 2018 FOIA memorandum:
 - ❖ Transparency
 - ❖ Timeliness
 - ❖ Quality
 - ❖ Professionalism
- ❖ To help you meet your performance measures.

Agenda

- ❖ EPA Performance Measures
- ❖ FOIA Overview
- ❖ A FOIA Request Lifecycle
 - ❖ Intake
 - ❖ Search
 - ❖ Review
 - ❖ Productions
- ❖ FOIA appeals and litigation
- ❖ Ensuring your office has a robust FOIA program
- ❖ Questions

SES PARS language (new!)

Promotes Agency's compliance with the Freedom of Information Act (FOIA) laws, regulations, policies, and Executive Orders.

Oversees prompt processing of the request, including:

- a **two-level review** of the documents;
- ensures issuance of timely and well-reasoned initial determination responding to the request;
- ensures proper application of the FOIA exemptions and other legal requirements prior to releasing information; and
- actively assists with related appeals and litigation.

Is accountable for ensuring that employees responding to FOIA requests have the knowledge, skills and abilities to perform their duties and respond in a thorough and timely manner to requests to ensure both:

- 1) protection of confidential and privileged information; and
- 2) the Agency's compliance with all applicable laws, regulations, policies, and Executive Orders.

What do I need to know? What am I held accountable for?

1. Prompt processing

- ❖ FOIA established response time frames (20 business days + 10 additional days if unusual circumstances exist)

2. FOIA staff compliance with FOIA law and Agency procedures

- ❖ Two-level review (one person must be a manager)
- ❖ Proper application of FOIA exemptions
- ❖ Proper training of FOIA staff

Why is it important to meet FOIA deadlines?

- ❖ Good customer service.
- ❖ **Avoid potential FOIA lawsuits.**
 - ❖ Requesters may seek judicial relief in district court if you fail to meet the statutory time frame for response. 5 U.S.C. § 552(a)(6)(C)(i).
 - ❖ FOIA litigation is labor intensive and expensive.
- ❖ **Attorney fees and costs** come out of EPA office budgets.
- ❖ Agency may not charge fees. 5 U.S.C. § 552(a)(4)(A)(viii).

Prompt Processing

- ❖ **Time Requirements:** The FOIA requires EPA to respond **within 20 working days** from the date the request was received. 5 U.S.C. § 552(a)(6)(A)(i).

- ❖ **Clock management:** You can toll or stop the clock.
 1. To clarify the scope of the request.
 2. To request a written assurance of payment or negotiate fees.

Need more time?

You can request an extension of 10 working days for “unusual circumstances.” 5 U.S.C. § 552(a)(6)(B)(i).

What may constitute “unusual circumstances:”

- ❖ The need to search for and collect records from “field facilities or establishments” separate from your location;
- ❖ The need to search for, collect, and review a voluminous amount of records;
- ❖ The need for consultation with another agency having a substantial interest in the determination of the request; or
- ❖ The need to consult with two or more components of the agency having substantial subject-matter interest in the determination of the request.

Need even more time?

You can extend the response time **beyond 30 working days** upon notice to the requester *in writing*:

- ❖ Unusual circumstances that apply to the request;
- ❖ Agency response requires more than 10 additional working days to complete;
- ❖ Provide an opportunity to limit the scope so that it may be processed within 30 working days or an opportunity to arrange an alternative time frame for processing the request or modified request;
- ❖ Provide contact information for the FOIA Public Liaison to assist in the resolution of any disputes between the requester and agency; and
- ❖ Provide notice of the requester's right to seek dispute resolution services from OGIS and OGIS' contact information.

Options for ensuring prompt processing

1. Flow board – visual depiction of your office's FOIA requests and where each request is in the processing life cycle.
2. FOIAonline – multi-agency, cloud-based application, work flow system and repository
 - ❖ Accepts FOIA requests and allows users to search for information previously released
 - ❖ Agency can track requests through the use of tasks and by generating reports
 - ❖ Release records to requesters and execute/manage other communications with requesters
 - ❖ Manage FOIA case files in accordance with the record schedule.

Example of a flow board

(b)(5) DPP

Lifecycle of a FOIA request

Four Steps:

1. Acknowledge receipt of request, understand statutory deadlines, and evaluate request
2. Search
3. Review
4. Production

What is your role in this process?

- ❖ Understand the statutory and regulatory requirements
- ❖ Assist your office in efficiently and effectively meeting these requirements
 - Ensure proper training of FOIA Professionals
 - Discuss response plan with subject matter experts and processing staff
 - Assist in search development
 - Ensure review requirements are met

Step 1: Acknowledge receipt of request and evaluate request

Questions to consider when a FOIA is assigned to your office/region:

- ❖ Is the FOIA request properly assigned to your office?
- ❖ Is the FOIA request reasonably described such that your staff know how to locate the records?
- ❖ If the FOIA request is reasonably described, are there other issues –resource concerns, voluminous amount of records – that impact your office's response?

Assessing your FOIA Requests

A proper FOIA request:

- Request for **agency records** submitted in writing.
- Request **reasonably describes** records requested.
- Request complies with agency's regulations for making requests.

5 USC § 552(3)(A)

Assessing your FOIA Requests: Is the request for agency records?

Agency Records – 2 part test:

- 1) Created or obtained by agency; and
- 2) Under agency control when request received.

Question – FOIA does not require EPA to do what?

- ❖ Create a new record or re-create records that were properly disposed;
- ❖ Produce records over which we retain no control;
- ❖ Answer questions, or explain Agency decisions;
- ❖ Perform research in order to understand;
- ❖ Produce purely personal records; or
- ❖ Produce future records.

Does the FOIA request reasonably describe the records sought?

Can you identify and locate the records sought based on the information provided in the FOIA request?

Consider/Ask yourself:

- ❖ If the scope of the FOIA is unclear;
- ❖ If the request as written seems broader than the information you believe the requester is interested in; and/or
- ❖ If you know how/where you would search for the records.

Items to evaluate and discuss with requester if request appears unclear or overly broad:

1. Type(s) of records sought;
2. Date range(s);
3. Program Office(s)/Position(s)/Custodian(s); or
4. Identification of Subject matter(s)/Search Term(s).

**Knowledge
check:**

**Evaluate these
requests**

Example 2

From January 20, 2017 to the date that EPA conducts this search, the communications mentioning, including, and/or generated by EPA's "FOIA Expert Assistance Team."

Note: the requester is not requesting any communications between the FOIA Expert Assistance Team and external FOIA requesters, but is seeking communications internal to EPA and with other agencies or offices of the federal government.

Ensure staff know how to handle an improper FOIA request

- ❖ If the request does not seek agency records (*e.g.*, is seeking an answer to a question) you do not have to answer it under the FOIA. Follow up with requester to clarify what records are sought.
- ❖ If the request is not reasonably described - you **must** contact the requester for clarification or modification. *See* 40 C.F.R. § 2.102(c) (“Procedures for making requests”).
- ❖ **Stop the processing clock** while you seek clarification.
- ❖ **Resources:**
 - ❖ Template letters for improper/not reasonably described FOIA requests.
- ❖ **When in doubt, contact the requester for clarification!**
 - ❖ Why does this matter? You want to respond to a specific request that your team understands!

Step 2: Search

- ❖ **Legal Standard:** Agencies must conduct a search that is “**reasonably calculated** to uncover all relevant documents.” (Weisberg v. DOJ, 705 F.2d 1344, 1351 (D.C. Cir. 1983)).

- ❖ “**Reasonably calculated**” is situation specific.
 - ❖ Make reasonable efforts to search for relevant records in multiple formats or locations, including electronic records.
 - ❖ A search need not be perfect, only adequate, and adequacy is measured by the reasonableness of the effort **in light of the specific request** ((Meeropol v. Meese, 790 F.2d 942, 956 (D.C. Cir. 1986))).

Conducting a defensible search

What information do you need to know in order to conduct a reasonable search?

- **Scope of the request** - Make sure that you and the subject matter experts clearly understand which records the requester is looking for.
- **Search Time Frame** - Use date of request (§ 2.103(a)), unless there is a delay in initiating the search. If a different cut off date is used, notify requester pursuant to current EPA FOIA regulations (§ 2.103(a)).
- **Record Repositories** - Identify all repositories likely to contain responsive records, including hardcopy and electronic repositories.
- **Record Custodians** - Identify individuals reasonably likely to possess responsive records in all identified offices, including any former employees involved in the matter.
- **Publicly Available** - Has the Agency already released documents in response to an earlier FOIA(s) on the same or similar topic? If so, direct requester to this information as an interim release.

Knowledge Check

How would you
search?

- ❖ Documentation for all EPA Federal inspections conducted at the Atlantic States Cast Iron Pipe 183 Sitegreaves Street, Phillipsburg, NJ; Facility is EPA NJD079114054; EPA inspections and reporting for the site.
- ❖ Records pertaining to the US EPA Brownfield Case 1016347206 at the associated address 3-4 ARCHER TERRACE, South Boston, Massachusetts , 02127 under Site name “ECO R2 - 3-4 ARCHER TERRACE.” I am hoping to find records describing the chemical contamination that may have occurred at the site as well as confirmation if any cleanup of the site is needed. Also associated with this request is a phase II ESA report that you may have on file at the adjacent property, 1-2 Archer Terrace, South Boston, Massachusetts , 02127.

Step 3: Review

Who will review the records?

What is the basis for the review?

How will the records be reviewed?



Who will review records

- ❖ Accountability – PARS element:
 - ❖ Ensure FOIA Professionals have the knowledge, skills and abilities to respond in a thorough and timely manner to requests
- ❖ How many reviewers do you need?
- ❖ Are they trained?
 - ❖ Review software
 - ❖ Responsiveness review (based on specifics of the request; coding memos)
 - ❖ Knowledge of exemptions and how to properly apply them

What is the basis for the review?

❖ Accountability (PARS):

- Ensures proper application of the FOIA exemptions
- Ensures protection of confidential and privileged information

❖ Responsiveness

- Ensure reviewers understand the scope of the request, especially any modifications to the scope
- Consider a coding memo to provide guidance on scope of request

❖ Withholdings (Exemptions)

- Presumption of disclosure
- 9 FOIA Exemptions

How will the records be reviewed?

- ❖ Follow Agency regulations and procedures for review
 - Two – level review
 - One of the reviewers must be a manager
- ❖ What is the universe of potentially responsive documents?
- ❖ Available document review and redaction platforms
 - Adobe
 - Relativity



Review: FOIA exemptions

1. Classified Information
2. Internal Personnel Rules & Practices
3. Exempted by Other Statute
4. **Confidential Business Information**
5. **Deliberative Process, Attorney-Client, and Attorney Work Product Privileges**
6. **Personal Privacy Information**
7. Law Enforcement
8. Matters Related to Regulating or Supervising Financial Institutions
9. Wells

Exemption 4 CBI

FOIA Exemption 4 (5 U.S.C. § 552(b)(4)) covers two categories of information:

1. Trade Secrets
2. Commercial or financial information obtained from a person that is privileged or confidential

Purposes of Exemption 4:

- ❖ To encourage businesses to provide government with accurate and reliable confidential information; and
- ❖ To provide assurances that the information will be safeguarded, therefore protecting businesses from competitive disadvantage.

Exemption 5

Protects “**inter-agency or intra-agency memorandums** or letters which would not be available by law to a party other than an agency in litigation with the agency”

- ❖ Incorporates civil discovery privileges into the FOIA.
 - ❖ Deliberative Process Privilege (DPP)
 - ❖ Attorney-Client Privilege
 - ❖ Attorney Work Product Privilege

Exemption 5: Threshold requirement

- ❖ “Inter-agency or intra-agency”: if this isn’t satisfied, you cannot assert Exemption 5.
- ❖ As interpreted, this is not strictly limited to records internal to executive branch agencies — depending on the facts, it **may** in limited circumstances also include agency communications with:
 - Outside experts and other consultants
 - States, tribes
 - Contractors
 - Federal Commissions
 - The White House

Elements of Exemption 5 DPP

- (1) **Predecisional:** The information must have been created before the adoption of an agency policy/decision.
- (2) **Deliberative:** Material is deliberative if it "reflects the give-and-take of the consultative process."

What are some common examples?

- Drafts
- Comments on draft filings, reports, or rule-making documents
- Internal e-mail discussions of potential courses of action
- Memoranda discussing Agency options

Exemption 5: DPP and factual material

Generally ... the Agency must release factual material because it is generally available for discovery and does not threaten deliberative process.

But may withhold facts if the record

Reflects a distillation, selection, or summary of facts – an exercise of judgment.

- Facts that are “inextricably intertwined” with exempt material may be withheld.

Knowledge Check

Does the DPP apply?

- ❖ Documents that were created after the final decision was made.
- ❖ Documents created by a trade association.
- ❖ Documents restating a final decision.
- ❖ Talking points re-stating the same information that is on EPA's website.

Exemption 5 DPP and the foreseeable harm standard

- ❖ Foreseeable harm analysis for deliberative process privilege:
 - ❖ Harm quality of agency decisions?
 - ❖ Chilling effect on candid opinions / advice?
 - ❖ Public confusion from disclosure?
 - ❖ But: embarrassment \neq harm.
- ❖ Now required by law (2016 FOIA Improvement Act, 5 U.S.C. § 552(a)(8)(A)(i)).
 - ❖ Exemption 5 of the FOIA is amended to provide that “the deliberative process privilege **shall not apply to records created 25 years or more** before the date on which the records were requested.”

Summary: Applying Exemption 5 DPP

Steps in considering Deliberative Process Privilege:

1. Inter/intra threshold
2. Exemption elements (predecisional & deliberative)
3. Foreseeable harm analysis
4. Less than 25 years old

Exemption 5: Attorney-client communications

- ❖ **Legal Standard** – confidential communications between an attorney and his or her client relating to a legal matter for which the client has sought professional advice.
- ❖ **Confidential communications** between agency attorneys can be covered, as can communications between attorneys and staff, that discuss legal issues or ask for legal advice.
 - Must be kept **confidential**/need to know.
- ❖ A **cc to an Agency attorney isn't itself enough** (unless it's clear that purpose is to get/give attorney advice)!

NOTE: You still have to meet the Exemption 5 inter-/intra- Agency threshold.

Exemption 5: Attorney work product

The work product privilege protects material:

- (1) prepared by, or at the direction of, an attorney
- (2) in reasonable anticipation of litigation.

❖ Extends to civil, criminal, and administrative litigation, as well as amicus briefs. *Env'tl. Prot. Servs. v. EPA*, 364 F. Supp.2d 575, 586 (N.D. W. Va. 2005) (EPA administrative enforcement proceeding).

Exemption 6: Privacy

Protects information about individuals in:

- ❖ “personnel and medical files and similar files” when the disclosure of such information...
- ❖ “would constitute a clearly unwarranted invasion of personal privacy.”

What are some common examples?

- ❖ marital status
- ❖ health/medical information
- ❖ personal address, home phone number, personal cell phone number
- ❖ social security number

Exemption 6 test

BALANCING TEST

To determine whether “disclosure would constitute a clearly unwarranted invasion of privacy”

- ❖ Weigh/Balance: **public’s right to disclosure against the individual’s right to privacy**
- ❖ NOTE: “[S]omething, even a modest privacy interest, outweighs nothing every time.” *Air Force v. Rose*, 425 U.S. 352, 372 (1976).

Don't forget to segregate!

Exemptions and Segregation

Agencies must identify and segregate exempt information and apply the appropriate exemption to indicate the basis for each redaction.

- **OIP Guidance:** *Segregating and Marking Documents for Release in Accordance with the OPEN Government Act (10/23/08)*
- **2016 FOIA Improvement Act**

Redact exempt information from releasable documents

Why is this important? Failure to segregate is a basis for an appeal and may result in OGC remanding the request back to you for proper response!

Step 3 cont.: Additional reviews

Referral:

- ❖ A record was created by another agency but is in EPA's possession
- ❖ EPA may refer the record(s) to the other agency so that they can respond directly to the requester

Consultation:

- ❖ Another agency has a significant interest in a record
- ❖ EPA may ask for the agency's recommendation as to how to treat the record
- ❖ White House Consultations: Contact Rasheena Spears in the NFO

Equity Review:

- ❖ Obtaining the opinion of another office before responding to the requester.

Step 3 cont.: Equity reviews

What are the triggers?

- ❖ Record is responsive and contains information of substantive interest to another office
- ❖ Includes documents created in that office, emails involving personnel from that office, and opinions or advice given by an attorney in a legal office.

Pro Tips

- ❖ Identify equities during document review. Relativity coding panel includes buttons for tracking equities.
- ❖ If the record includes OGC/ORC communication then the attorney should review the record.
- ❖ Equity reviews take time – plan accordingly!

Step 3 cont.: Awareness notification

- ❖ **What is this?:** Notification to EPA senior leaders of the release of information through FOIA that may be of particular interest to the press, the public and/or Congress.
- ❖ **Not required for all FOIAs.** FOIAs subject to awareness notification will be flagged in FOIAonline.
- ❖ **This is not an approval process** and it does not alter EPA's process for identifying, collecting and reviewing documents, or preparing responses to FOIA requests.
- ❖ **Timing:** If FOIA is flagged for awareness notification, **need to schedule in three business days** into the response time frame before releasing records.

Step 4: Production

- ❖ Agency must provide records in any form requested “if readily reproducible”
- ❖ Certain information must appear in final response letters, including:
 - ❖ Tracking number in the subject line;
 - ❖ Reasons for denial of any records;
 - ❖ Brief statement concerning reason(s) for withholding (exemptions asserted);
 - ❖ FOIA exemptions applied;
 - ❖ Estimated volume of records being withheld (in pages or other forms of estimation);
 - ❖ Identification of records being withheld (or if large volume, categorical descriptions);
 - ❖ Appeal language; and
 - ❖ A signature from the division director (or higher level).

The importance of a good administrative record

- ❖ A **good administrative record** tells the story of the request – from start to finish.
- ❖ FOIAonline – Use **Comments and Correspondence** features to maintain your administrative record.
- ❖ **Include:**
 - ❖ All communications (phone calls, email, and letters) with requester;
 - ❖ Summarize internal discussions about request, especially decisions regarding interpretation of request, search strategy, withholdings, consultations, productions;
 - ❖ Procedural actions and reasoning (e.g., clock stoppage, office reassignment);
 - ❖ Search instructions;
 - ❖ Applied and unapplied versions of redacted and withheld records; and
 - ❖ Any information you think would be helpful if the matter is appealed or litigated.

Overview of the FOIA appeals process

Requesters can appeal any “adverse determination” by EPA:

- ❖ What constitutes an adverse determination is defined in the FOIA Regulations, 40 C.F.R. § 2.104(g) (*e.g.*, denial of fee waiver; determination to withhold any requested record in whole or in part).
- ❖ Include “appeal language” in all final responses (with one rare exception).

Requesters now have 90 days to appeal a response.

- ❖ Time is measured by when EPA receives the appeal.
- ❖ OGC still has 20 working days to respond to the appeal.
- ❖ Can be extended per the same “unusual circumstances” requirements of requests.

Common issues seen in appeals

- ❖ Failure to respond within statutory time frame.
 - ❖ Reminder – 20 working days to respond; additional 10 working days if unusual circumstances exist.
- ❖ Inadequate Search
- ❖ Agency has improperly withheld records.
 - ❖ Documents withheld in full v. redacting exempt information from releasable records.
 - ❖ Redacting information solely on the basis that the information is non-responsive to the request.
 - ❖ Inconsistency in redactions within duplicates and email threads.

How to avoid FOIA appeals

COMMUNICATE WITH THE REQUESTER (& INTERNALLY)

- Large majority of appeals could be deferred, simplified, or avoided with better communication.
- Importance of written communication in FOIAonline.

REDACT DOCUMENTS INSTEAD OF WITHHOLDING IN FULL

- There is a statutory requirement to redact when possible.
- If we get an appeal with no attempt to redact, we will remand it back to your office.

PAY ATTENTION TO YOUR DESCRIPTION OF WITHHOLDINGS

- Most requesters believe they are entitled to a *Vaughn* Index.
- EPA regulations require certain elements: 40 C.F.R. § 2.104(h).
- A little goes a long way:
- Try to provide a basic list of withholdings or detailed descriptions if you are using categories.
- Focus on the detail that you **can** provide and don't shy away from index just because you don't have to.

Overview of litigation process

- ❖ A FOIA requester must allege that an agency has improperly withheld records.
 - ❖ If EPA fails to respond; or
 - ❖ If the FOIA requester is not satisfied with EPA's FOIA response following an administrative appeal.
- ❖ EPA has 30 days to respond to a complaint.
- ❖ DOJ and OGC role in litigation.
- ❖ Program Office and Regional Roles in litigation.

Avoidable litigation pitfalls

- ❖ Processing improper FOIA requests.
- ❖ Incomplete searches.
- ❖ Processing or review shortcuts.
- ❖ Production (or lack thereof).

Accountability of your staff

PARS Requirement:

- ❖ Supervisors are accountable for ensuring that employees responding to FOIA requests have the knowledge, skills and abilities to perform their duties and respond in a thorough and timely manner to requests to ensure both.

FOIA requires dedicated, skilled staff to :

- ❖ Understand the processing steps and timeframes.
- ❖ Clearly communicate with the public orally and in writing.
- ❖ Properly document processing steps taken in FOIAonline.
- ❖ Properly review documents.
- ❖ Elevate concerns and resource needs when appropriate.

Who is your FOIA team?

- ❖ FOIA Coordinator/Officer
- ❖ FOIA Point of Contact* (someone in your office)
- ❖ Subject-matter expert(s) (SMEs)
- ❖ Legal Counsel (case/subject matter; Information Law Attorney)
- ❖ You!

Summary

You and your team need to know the essentials:

- ❖ What the statute and EPA's FOIA regs, and policy require.
- ❖ How to process a request in FOIAonline once it is assigned to your office.
- ❖ How to identify an improper request and clarify if needed.
- ❖ How to correctly manage processing timeframes.
- ❖ How to conduct and document a defensible search.
- ❖ How to properly review documents.
- ❖ When to send documents for additional review.
- ❖ How to release documents to the public.
- ❖ Where to go for additional help.

Where to find help

National FOIA Office (NFO)

FOIA Public Liaison

Main Line (202) 566-1667

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DOJ Office of Information Policy

(202) 514 - FOIA (3642)

Where to find help (cont.)

Web Resources:

- [FOIAonline](#)
- [OGC National FOIA Office](#)
- [DOJ Office Info Policy](#)

❖Online Training Resources:

- [FOIA Toolkit](#)
- [National FOIA Training Conference Resources](#)
- [Relativity Training](#)